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No. 92-1936

In The

Supreme Court of the United States

October Term, 1992

FRANKLIN YEAGER, WALTER BRANDT, DON C. YEAGER and MARK YEAGER,

Petitioners,

vs.

CITY OF McGREGOR, McGREGOR VOLUNTEER FIRE DEPARTMENT and TOM KIRK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The City of McGregor, Texas, Defendant/Appellee in the courts below, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Franklin Yeager, Walter Brandt, Don C. Yeager and Mark Yeager, and requests that this Court deny said Petition and decline to review the judgment and opinion of the

United States Court of Appeals for the Fifth Circuit that was entered on January 5, 1993.

STATEMENT OF THE CASE

A. GENERAL

1. The Petitioners assert that the City of McGregor, Texas is liable under the provisions of 42 U.S.C. § 1983 for the act of the members of a small private volunteer fire department. Petitioners were voted out of membership in the private association by the other members. This is the act of which Petitioners complain. The United States Court of Appeals for the Fifth Circuit and the United States District Court for the Western District of Texas correctly found that there existed absolutely no evidence that the City of McGregor encouraged, coerced or participated in the act of the volunteer fire department in voting the Petitioners out of membership. (Appendix A-17, B-5 to Petition for Writ of Certiorari). The Courts below further correctly held that the City had no policy making authority over the volunteer fire department and that there existed no evidence that the City Council or City Manager, who was a policy maker for personnel matters, had any connection with or exercised any influence over the vote of the volunteer fire department. (Appendix A-18, B-6 to Petition for Writ of Certiorari). The District Court further found that the Petitioners were simply not terminated for exercising any constitutional right, and that the Petitioners were disruptive and constantly argumentative regarding the day to day operation of the

volunteer fire department. It was based upon these findings that the District Court granted summary judgment in favor of the City of McGregor and the United States Court of Appeals for the Fifth Circuit affirmed such judgment.

2. The City of McGregor is a small home rule city located in rural McLennan County, Texas. The City has never created nor operated a fire department (Record, Vol. 2, p. 309) nor, under Texas Law does it have any obligation or duty to do so. Section 342.001 of the Local Government Code of the State of Texas provides that home rule city may create a fire department but places no obligation on such a city to have a municipal fire department. The City is governed by a City Council and is managed by a City Manager.

In contrast, the McGregor Volunteer Fire Department ("VFD") is a private non-profit volunteer association of private individuals. The VFD is self governing. The membership of the VFD is controlled completely by its existing members. Neither the City Council nor the management of the City of McGregor control or in any way determine who the members of the private VFD will be.

3. At no time did the City Council or City Manager of the City of McGregor discuss or consider the membership of the Petitioners in the volunteer fire department nor did they direct, coerce or encourage the VFD to vote the Petitioners out of membership. (Record, Vol. 2, pp. 310-312). The decision to revoke the membership of the Petitioners was that of the members of the VFD.

B. PETITIONERS' MISCHARACTERIZATION OF MATERIAL FACTS

The petitioners have alleged in conclusory fashion that the City has somehow "delegated" firefighting authority to the VFD. By doing so, the Petitioners attempt to vicariously attach liability to the City in an effort to make it responsible for the alleged acts of a private entity without the City having participated in such acts in any way. The City of McGregor did not delegate anything to the VFD and there is no evidence in the record to support such conclusion. The City of McGregor has at no time undertaken to provide fire service and has no obligation to do so. (Record, Vol. 2, p. 309).

Neither the Charter nor the Code of Ordinances of the City of McGregor requires or directs the VFD to submit the VFD Chief or any other officer for approval by the City, and the City does not require the VFD to submit its constitution or bylaws to the City for approval. If any document exists which indicates that the approval of the City is requested, such requirement would be only in the VFD's own documents and not pursuant to any requirement of the City. (Record, Vol. 2, pp. 310-312). It is inaccurate to represent to this Court that the City of McGregor "retained" the right to approve the constitution, bylaws or officers of the VFD. Such authority was never the City's and it never took any act to "retain" any such responsibility.

The City paid a token stipend to members of the VFD to show its appreciation for their efforts. In addition, the City paid $10.00 per year to a State pension program. Any

other assertion regarding the City budget is not supported by any competent or admissible evidence in this record. Further, the City at no time ordered an audit of the VFD, but did offer to assist the VFD by making its accountant available to review VFD records. However, it was determined that the City could not expend public funds to investigate any alleged financial issue relating to the VFD since the VFD was a private entity. (Record, Vol. 1, p. 629-632). Petitioners' assertion that the VFD was designated to enforce the City's fire code is wrong and there is no evidence in this record to support that assertion. There is nothing in the Charter or the Code of Ordinances of the City of McGregor which indicates that any person performing any function on behalf of the City is required to be a member of the VFD.

The undisputed evidence shows clearly that the City exercised no management or control over the VFD and had no role in the VFD membership decisions. Such decisions were made by the private VFD members.

ARGUMENT FOR DENYING PETITION FOR WRIT OF CERTIORARI

I.

The opinion of the Fifth Circuit Court of Appeals relative to Petitioners' action against the City of McGregor is not in conflict with any previous opinion of this Court, the Fifth Circuit Court of Appeals nor the laws of the State of Texas. Such decision is well grounded in fact and is law. It has been consistently held that a city government cannot be liable under 42 U.S.C. § 1983 for

the act of a private organization unless the city has acted to exercise coercive power on the private entity forcing the private group to deprive a person of a protected right or has significantly encouraged the private entity to deprive a person of such right. *Frazier v. Board of Trustees,* 765 F.2d 1278, 1283-84, or rehearing 777 F.2d 329 (5th Cir. 1985). The active participation of the city must be to the degree that the choice to deprive a person of rights must be deemed to be that of the City. *Ezpeleta v. Sisters of Mercy,* 800 F.2d 119 (7th Cir. 1986), *Hinman v. Lincoln Towing Service, Inc.,* 771 F.2d 189 (7th Cir. 1985), *Frazier,* supra. There was no evidence whatsoever that the City coerced or in any way participated in the act of which the Petitioners complain.

Likewise, the holding of the Fifth Circuit that the act of voting the members out of the VFD was not pursuant to a custom or policy of the City of McGregor is fully consistent with earlier opinions of this Court and of the Fifth Circuit Court of Appeals.[1] As the Fifth Circuit found, there was no connection between the City and the act complained of. The Charter of the City of McGregor made the City Manager responsible for the proper administration of all affairs of the City and provided no authorization or means for delegation of City personnel policy making authority to any other person or entity. (Record, Vol. 2, pp. 320-321). Similarly, the City Council of the City of McGregor adopted an ordinance (Section 2-6 City

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[1] See *Monell v. Dept. of Social Services,* 436 U.S. 658, 93 S.Ct. 2018, 56 L.Ed.2d 611 (1978), *City of St. Louis v. Praprotnik,* 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988), *Neubauer v. City of McAllen,* 766 F.2d 1576, 1574 (5th Cir. 1985).

Code) which specifically designated the City Manager as Chief Executive Officer of the City responsible for the administration of all affairs in the City. (Record, Vol. 2, p. 319). The City Manager therefore is the only person to whom relevant policy making authority has been delegated. The uncontroverted summary judgment evidence shows that the City Manager played no part in the removal of the Petitioners from the VFD and, in fact, the Petitioners acknowledge that the City Manager did not take part in that process. (Record, Vol. 3, p. 4-5). No person holding authority in the area of personnel matters of the City participated in any way in the decision to remove the Petitioners and no such person could have done so because of the private nature of the VFD. (Record, Vol. 2, pp. 310-312).

Section 342.001 of the Texas Local Government Code makes it clear that a City such as McGregor may provide for a fire department but does not require the same. Consistently, no Texas cases set up firefighting as some sort of exclusive governmental function. To the contrary, as noted by the Fifth Circuit Court of Appeals, firefighting is far from an exclusive governmental function with private and volunteer fire departments providing services throughout the State and Country. (Appendix A-10,11 to Petition for Writ of Certiorari). The Texas cases cited by Petitioners relative to firefighting as a government function[2] stand only for the proposition that under

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[2] *Genzer v. City of Mission*, 666 S.W.2d 116 (Tex. Civ. App. – Corpus Christi, 1983, ref. n.r.e.); *City of McAllen v. Morris*, 217 S.W.2d 875 (Tex. Civ. App. – San Antonio, 1948, err. ref'd.); *City of Coleman v. Rhone*, 222 S.W.2d 646 (Tex. Civ. App. – Eastland,

fact specific situations the exercise of fire protection power is not inconsistent with the police power authority of a City.

Further, Section 101.0125 of the Texas Civil Practice and Remedies Code is neither determinative nor particularly relevant to the issue of state action. Because the City of McGregor had no involvement whatsoever in the act of which Petitioners complain, for the reasons shown above, the language of Section 101.0125 can only be relevant to the issue of whether 42 U.S.C. § 1983 applies to the VFD. Section 101.0125 is not any express determination that the activities set forth therein are exclusive governmental functions. To accept that position would be to accept that every hospital, cemetery and recreation facility in the State of Texas is subject to the provisions of 42 U.S.C. § 1983. Clearly that is not the case. Section 101.0125 simply states that a governmental entity undertaking to perform acts described therein has immunity from tort liability relating to such activity because such activity is not inconsistent with the police power authority of a City.

None of the Fifth Circuit holdings cited by the Petitioners[3] support the position that the City of McGregor

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1949, no writ); and *City of Houston v. Southwest Concrete Construction, Inc.* 835 S.W.2d 728 (Tex. App. – Houston [14th Dist.] 1992, no writ).

[3] *Wilcox v. Terrytown Fifth District Volunteer Fire Department, Inc.*, 897 F.2d 765 (5th Cir. 1990); *San Antonio Metropolitan Transit Authority v. McLaughlin*, 876 F.2d 441 (5th Cir. 1989); *Garcia v. San Antonio Metropolitan Transit Authority*, 838 F.2d 1411 (5th Cir. 1988); and *Peel v. Florida Department of Transportaton*, 600 F.2d 1070 (5th Cir. 1979).

might be responsible or liable for the acts of the private VFD. Additionally, none of those cases relates to 42 U.S.C. § 1983 and none holds that fire protection is an exclusively governmental function.

II.

The Fifth Circuit correctly analyzed the relationship between the City of McGregor and the private volunteer fire department. There is no factual or legal support whatsoever for the proposition of Petitioners that the City of McGregor somehow delegated anything to the VFD. To the contrary, the record clearly shows that the City never undertook to provide fire protection, that Texas law does not require the City to do so and that the City did not delegate any authority to the VFD. (Record, Vol. 2, pp. 309, 310-312, Sec. 342.001 Tex. Local Govt. Code). Further, as pointed out in the Fifth Circuit opinion, since the VFD was a private association, the City did not hold, in the first instance, authority to regulate membership in the VFD and therefore could not have delegated that authority to them. (Appendix-A-18 to Petition for Writ of Certiorari). In short, there was no delegation and the City never undertook anything to delegate.

There is simply no legal or factual basis for holding the City vicariously liable for an alleged act of the VFD in which the City had no involvement. The cases of *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486 (1966), *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764 (1982), and *Janusaitis v. Middlebury Volunteer Fire Department*, 607 F.2d 17 (2nd Cir. 1979), do not address the issue of liability of a governmental entity for the acts of a private entity. Rather, these

cases address the question of whether the private organization itself can be liable under 42 U.S.C. § 1983 by virtue of the function it performs. Nothing in those cases would subject the City of McGregor to liability for the act of the private VFD.

Further, Petitioners clearly mischaracterize the opinion in the case of *Shelton v. City of College Station*, 754 F.2d 1251 (5th Cir. 1985). The *Shelton* case does not support the incorrect assertion that the act of the VFD is the act of the City of McGregor. In *Shelton*, the Plaintiff complained that he had applied for a variance from the City of College Station's Zoning Board of Adjustment ("ZBA") and that such variance had been improperly denied. The Court found that the ZBA was specifically created by the City by ordinance pursuant to a state statute for a quasi judicial purpose of resolving issues related to the City's zoning ordinances, that all its members were appointed directly by the City Council, that the ZBA could grant variances to the City's zoning ordinances and that the ZBA could only act on those zoning matters designated by the City Council. Based on those specific conditions, the Court found that the ZBA was a policymaker of the City. The Court did not create any new exception to the requirement that a cause of action may exist against the City only in case of coercion of a private entity or for the act or policy of its governing body or some official policy maker. Further, there is nothing in this record or before this Honorable Court which would establish that the act of the members of the VFD was an official act or policy of the City of McGregor.

CONCLUSION

The United States Court of Appeals for the Fifth Circuit correctly affirmed the judgment of the United States District Court for the Western District of Texas entered in this cause. The Fifth Circuit Court of Appeals correctly applied existing law and did so in a manner fully consistent with the opinions of this Court and the Fifth Circuit, as well as the laws of the State of Texas. Accordingly, Respondent, City of McGregor, Texas, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari filed by Franklin Yeager, Walter Brandt, Don C. Yeager and Mark Yeager.

Dated this the 25th day of June, 1993.

Respectfully submitted,

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